

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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RAMIRO HERNANDEZ,

Case No. 2:15-cv-02084-MMD-NJK

v

Plaintiff,

ORDER

GREEN TREE SERVICES, et al.,

Defendants.

I. SUMMARY

This removed action involves a dispute relating to a loan modification. Before the Court is Defendants Green Tree Servicing LLC (“Green Tree”) and Ditech Financial LLC’s (“Ditech”) Motion to Dismiss. (ECF No. 11.) The Court has reviewed Plaintiff’s response and Defendants’ reply.¹ (ECF Nos. 17, 18.)

II. BACKGROUND

Plaintiff is pursuing this action *pro se*. The following facts are taken from the Complaint. Plaintiff “initially fell behind on mortgage payments” on a loan that was presumably secured on the real property located at 2205 Jansen Avenue in Las Vegas (“the Loan”). (ECF No. 1-1 at 3.) In May 2010, Bank of America approved Plaintiff’s loan modification and Plaintiff “was instructed that said ‘Modification Agreement’ would become a permanent modification upon completion of the trial payments.” (*Id.* at 3.) The servicing rights to the Loan were subsequently transferred to Green Tree and then

¹Plaintiff's response was untimely. However, the Court will consider Plaintiff's response.

1 to Ditech, but despite his request for “information on said ‘permanent modification,’”
 2 Plaintiff has yet to receive confirmation. (*Id.*) Nor has Plaintiff received other pertinent
 3 information, such as a form amortization schedule or how his payments in the last five
 4 years have been applied. (*Id.*) The statements Plaintiff has received show the amount of
 5 “Deferred P&I” has remained the same. (*Id.*) The loan modification agreement made
 6 with Bank of America “appears to never have been made final nor recorded.” (*Id.*)

7 The Complaint recites the elements of misrepresentation and the requirements
 8 for pleading fraud. (*Id.* at 5-6.) The Complaint further moves for preliminary injunction
 9 and seeks to quiet title as a relief. (*Id.* at 6-7.) Accordingly, it appears that Plaintiff is
 10 trying to assert claims for misrepresentation and fraud and he seeks injunctive relief.²
 11 Defendants move for dismissal under Rule 12(b)(6) and Rule 9 of the Federal Rules of
 12 Civil Procedure.

13 **III. DISCUSSION**

14 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which
 15 relief can be granted.” Fed. R. Civ. P. 12(b)(6). A properly pleaded complaint must
 16 provide “a short and plain statement of the claim showing that the pleader is entitled to
 17 relief.” Fed. R. Civ. P. 8(a)(2); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).
 18 While Rule 8 does not require detailed factual allegations, it demands more than “labels
 19 and conclusions” or a “formulaic recitation of the elements of a cause of action.”
 20 *Ashcroft v. Iqbal*, 556 US 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 555) (internal
 21 quotation marks omitted). “Factual allegations must be enough to raise a right to relief
 22 above the speculative level.” *Twombly*, 550 U.S. at 555. Thus, to survive a motion to
 23 dismiss, a complaint must contain sufficient factual matter to “state a claim to relief that
 24 is plausible on its face.” *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570)
 25 (internal quotation marks omitted).

26 In *Iqbal*, the Supreme Court clarified the two-step approach district courts are to
 27 apply when considering motions to dismiss. First, a district court must accept as true all

28 ²Plaintiff does not contend otherwise in his response brief.

1 well-pleaded factual allegations in the complaint; however, legal conclusions are not
2 entitled to the assumption of truth. *Id.* at 679. Mere recitals of the elements of a cause of
3 action, supported only by conclusory statements, do not suffice. *Id.* at 678. Second, a
4 district court must consider whether the factual allegations in the complaint allege a
5 plausible claim for relief. *Id.* at 679. A claim is facially plausible when the plaintiff's
6 complaint alleges facts that allow a court to draw a reasonable inference that the
7 defendant is liable for the alleged misconduct. *Id.* at 678. Where the complaint does not
8 permit the court to infer more than the mere possibility of misconduct, the complaint has
9 "alleged — but it has not shown — that the pleader is entitled to relief." *Id.* at 679
10 (quoting Fed. R. Civ. P. 8(a)(2)) (internal quotation marks and alteration omitted). When
11 the claims in a complaint have not crossed the line from conceivable to plausible, the
12 complaint must be dismissed. *Twombly*, 550 U.S. at 570. A complaint must contain
13 either direct or inferential allegations concerning "all the material elements necessary to
14 sustain recovery under some viable legal theory." *Twombly*, 550 U.S. at 562 (quoting
15 *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984)). Mindful of
16 the fact that the Supreme Court has "instructed the federal courts to liberally construe
17 the 'inartful pleading' of *pro se* litigants," *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th Cir.
18 1987), the Court will view Plaintiff's pleadings with the appropriate degree of leniency.

19 Plaintiff's claims for fraud and misrepresentation are subject to Rule 9(b)'s
20 particularity requirements. "In alleging fraud or mistake, a party must state with
21 particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). To
22 meet the heightened pleading requirements, a plaintiff must specify the time, place, and
23 content of the misrepresentation as well as the names of the parties involved. See
24 *Yourish v. Cal. Amplifier*, 191 F.3d 983, 993 n.10 (9th Cir. 1999). In a case with multiple
25 defendants, "Rule 9(b) does not allow a complaint to merely lump multiple defendants
26 together but requires plaintiffs to differentiate their allegations when suing more than
27 one defendant and inform each defendant separately of the allegations surrounding his
28 ///

1 alleged participation in the fraud." *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th
 2 Cir.2007) (internal quotation marks and citation omitted).

3 Here, the Complaint fails to allege fraud and misrepresentation with even general
 4 allegations, let alone with the level of details that meet Rule 9's particularity
 5 requirements. Plaintiff recites the elements of misrepresentation and recites case law
 6 about the requirements for pleading fraud, but such "formulaic recitation of the elements
 7 of a cause of action" is insufficient. See *Iqbal*, 556 US at 678. For example, in support
 8 of the misrepresentation claim, the Complaint fails to allege what false statements were
 9 made and by which Defendant, when the false statements were allegedly made,
 10 whether Defendant knew or believed the representation to be false, whether Defendant
 11 intended to induce Plaintiff to act, whether Plaintiff relied on Defendant's statement, and
 12 how Plaintiff was damaged. Plaintiff sues Green Tree and Ditech, but he fails to
 13 differentiate their alleged conduct and lumps them with Bank of America, who is not a
 14 defendant.

15 The Court has discretion to grant leave to amend and should freely do so "when
 16 justice so requires." *Allen v. City of Beverly Hills*, 911 F.2d 367, 373 (9th Cir. 1990)
 17 (quoting Fed. R. Civ. P. 15(a)). As Plaintiff is proceeding *pro se*, the Complaint has not
 18 been previously amended, and the Court cannot conclude from the scant Complaint that
 19 amendment would be futile, the Court grants leave to amend the Complaint to cure the
 20 deficiencies set forth in this Order.

21 **IV. CONCLUSION**

22 It is therefore ordered that Defendants' Motion to Dismiss (ECF No. 11) is
 23 granted. Dismissal is without prejudice and with leave to amend. Plaintiff has fifteen (15)
 24 days to file an amended complaint. Failure to file an amended complaint will result in
 25 dismissal with prejudice.

26 DATED THIS 9th day of May 2016.



27
 28 MIRANDA M. DU
 UNITED STATES DISTRICT JUDGE